

Authorities and subjects?

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Raimund Karl*

Authorities and subjects? The legal framework for public participation in Austrian archaeology

The Austrian National Heritage Agency [BDA] has long maintained that all archaeological fieldwork in Austria is only permitted with a permit according to the Austrian Monuments Protection Law. Such permits, since 1999, can only be issued to archaeology graduates, severely restricting the rights of most Austrian citizens to engage in self-determined archaeological research. Yet, the right to conduct self-determined research has been enshrined since 1923 in the Austrian Constitution, and increasingly been guaranteed by various international legal instruments. This paper demonstrates that the BDA has interpreted the law incorrectly. A proposal is also presented of how voluntary compliance with archaeological quality assurance regulations could be enhanced.

Keywords: public participation, archaeological heritage legislation, legal definition of archaeological heritage, excavation permit, Austria

L'ente austriaco per il patrimonio culturale [BDA] ha a lungo sostenuto che tutti gli scavi archeologici in Austria sono permessi solo a fronte di un permesso, in ragione della legge per la tutela dei monumenti austriaca. Questi permessi dal 1999 possono essere rilasciati solo a laureati in archeologia, limitando dunque per la maggior parte dei cittadini austriaci il diritto di partecipare alla ricerca archeologica indipendente. E tuttavia il diritto di partecipare alla ricerca indipendente è sancito dalla Costituzione del 1923 e garantito da vari strumenti internazionali. Questo articolo dimostra che il BDA ha interpretato illecitamente la legge e viene presentata una proposta per aumentare l'aderenza volontaria a regolamenti a garanzia di standard qualitativi in archeologia.

Parole chiave: partecipazione pubblica, legislazione per il patrimonio culturale, definizione legale di patrimonio archeologico, permesso di scavo, Austria

The legal framework for archaeology, and also for public participation in archaeology, has constantly been evolving over the last c. 200 years in Austria. As such, it reflects the values of two different kinds of societies; values are directly opposed to each other.

The first type of society is the authoritarian-hierarchical social organisation which dominated much of the 19th and early 20th century, the formative period of archaeology as a profession, and archaeological heritage management as a practice. This model, in which power emanates from the public authorities is strongly top-down in its organisation: in its

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ideology, the authoritarian-hierarchical state is ruled by 'the best'. These 'best', whether they have been put in their place of authority by divine grace, like the emperor, or, because of their noble birth or other suitable qualities, by the emperor, thus must autocratically decide what is 'in the public interest', and what is not: after all, they know best (see Watzlawick 2001, especially pp. 101-105). Conversely, everyone not born or raised into such a position of authority is a subject of those authorities, and has to listen and obey the decisions of their 'betters'.

This model was dominant in Europe until the 19th century, when its influence – albeit only slowly – started to decline; although in parts, it survives until today. It is characteristic for absolute monarchies – which existed, in Austria, until c. 1867 – and dictatorships – which Austria experienced in the period from 1933/1934 to 1945.

The other type of society is the liberal-egalitarian model of social organisation, based – at least loosely – on the principles of the enlightenment and the ideals of the French Revolution, of (in particular) liberty and equality (Karl 2019). In this model, power emanates from 'the people' themselves, while the state's (and its officials') function is only to administer the 'public interest', whatever that interest might be. As such, it is bottom-up: 'responsible citizens' decide discursively what is 'in their interest'. Citizens thus have the say in matters concerning them, rather than having to listen to and obey the decisions of the 'public' authorities.

This model of social organisation emerged in – mainly – Europe in the late 18th and 19th century, and has become dominant in much of Europe from the mid-20th century onwards. It is characteristic for modern, liberal democracies based on the rule of law. In Austria, such a more liberal regime was first introduced in c. 1867 and developed, albeit in a still limited form, until 1933; and has become the dominant system of social organisation from c. 1955 onwards.

Of course, these two models of social organisation are diametrically opposed in their approach to how decisions should be found and rights be exercised, and by whom; with the latter quite consciously having been developed in opposition to the former. Yet, both are still at loggerheads in Austrian archaeological heritage management; because heritage management in Austria first developed under the former regime, and now should operate under the latter.

Still, quite a few elements of the former have managed to survive, mostly because of the inherent conservatism of conservation agencies, professionals, and the conservation paradigm (or, as Laurajane Smith has referred to it, the *Authorized Heritage Discourse* [AHD]; Smith 2006, pp. 29-34). This conservatism has even been explicitly expressed by Marianne Pollak, an archaeology official of the Austrian National Her-

itage Agency, the *Bundesdenkmalamt* [BDA]: “The lack of a theoretical debate of the foundations of archaeological heritage management is due to a general *consensus of all participating experts* for the last c. two centuries” (Pollak 2011, p. 227). Given this conservatism, a summary of the history of Austrian archaeological heritage management and its legal development seems appropriate before we examine the current legal situation regarding archaeological heritage management and participatory research in Austrian archaeology.

1. A history of Austrian heritage management

First steps to protect heritage were taken in Austria as early as the 2nd half of the 18th century, with imperial decrees issued in 1776 and 1782 regarding chance finds of archaeology (Pollak 2010, p. 80), though limited both in terms of the regulations which were decreed, and their effectiveness.

1.1. Early days: 1812-1918

The first legislative step to protect archaeological heritage came when, in 1812, Austrian Civil Law was codified in the form of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB). Its provisions contained (in §§ 397-401) a general reporting duty for finds of ‘lost’ portable objects, including archaeological finds. In its original version, § 399 ABGB determined an ‘equitable’ division of finds ownership between all parties which, under civil law systems, could possibly claim ownership (per *occupatio*, *usucapio*, or *iura regalia*): 1/3rd went to its finder, 1/3rd to the landowner, and 1/3rd to the state.

However, already in the Late *Biedermaier*, the state authorities had realised that this was not achieving the intended outcome: finds were more often concealed than reported, especially if they were likely to be financially valuable. As such, legislation in 1846 was changed (by imperial decree), with the state renouncing its 1/3rd ownership claim, specifically to encourage finders to report archaeological finds (Karl *et al.* 2017). This resulted in a two-tier system: ownership in low-value archaeological finds was acquired generally by *occupatio* by the finder (§ 397 ABGB), while for finds of archaeological ‘treasures’ Hadrianic division applied (§ 399 ABGB).

In 1850 – that is, under Austrian Neo-Absolutism – the *k.k. Central-Commission* was founded, again by imperial decree. The Commission was not a heritage agency, but rather a ‘research institute’ for heritage recording and management, without any real legal powers (Frodl 1988).

Becoming active in 1853, its work relied strongly on volunteers: most of its 'Correspondents' were citizen scientists; and many of its 'Commissioners' originally were, too (see various entries in Brückler, Nimeth 2001). It is only in its later years, during the Late Austro-Hungarian Empire, that the Central-Commission became increasingly 'professionalised', particularly its 'Commissioners', while it was still mostly reliant on the work of its citizen scientist 'Correspondents', even though the number of professional archaeologists (as well as architects, art historians, etc.) among the latter also steadily increased.

In 1904, Alois Riegl became the *Generalkonservator* ('conservator general') of the Commission, and established some of the fundamental principles of heritage management (see e.g. Riegl 1903). The Commission also engaged in creating a legislative basis for (archaeological) heritage management (Pollak 2010, pp. 85-86), by trying to pull together various 19th century imperial edicts and decrees. Though these attempts remained unsuccessful, they created the foundations for the later *Denkmalschutzgesetz* [DMSG]. Still without a legislative basis, the *Staatsdenkmalamt* was founded within the *Central-Commission* in 1911; and at that, under highest imperial patronage: its first patron was Arch-Duke Franz Ferdinand, its first president Prince Franz I. von Liechtenstein.

The first actual heritage legislation was only introduced in the First Austrian Republic in 1918, with a specific law prohibiting exports of portable heritage. However, major legislative activity concerning heritage and public participatory rights came in 1923, when the first proper monuments protection law, the DMSG, was passed by parliament (Helfgott 1979, pp. 4-7). That law was mostly based on the late 19th and earliest 20th century drafts produced by staff of the *Central-Commission* (Pollak 2010, p. 85). Perhaps even more importantly, the new Austrian Constitution was also passed by parliament in 1923, especially the *Bundes-Verfassungsgesetz* (B-VG); though it also raised the provisions of the *Staatsgrundgesetz* 1867 [StGG], which establishes the main civil rights of Austrian citizens, to the constitution. Both are important in the context of heritage protection and participatory rights to research cultural heritage: while Art. 10 (1.13) B-VG makes it a constitutional duty of the federal state to legislate for and provide administration of heritage protection; Art. 17 StGG provides an unconditional constitutional protection for Freedom of Research (Berka 1999, pp. 342-347).

In practice, however, there was little change: the *Staatsdenkmalamt* was renamed into *Bundesdenkmalamt*, but otherwise continued the work done by the *Central-Commission*. There were no changes to staffing: the

new BDA continued to employ its only professional archaeological officer, *Georg Kyrle* (Brückler, Nimeth 2001, p. 149); but most fieldwork continued to be conducted by former 'Correspondents' of the *k.k. Central-Commission*, that is, mostly by citizen scientists.

1.2. The Denkmalschutzgesetz 1923

The DMSG in its 1923 original version reflected strongly its historical (legislative) context: the main means of protection used in it is scheduling (§§ 2-3 DMSG) to avoid too much interference with private property rights, which was critical in the post-First World War economic crisis in Austria. Quite generally, the DMSG treated (and still treats) archaeology as a secondary concern. Consequently, there were hardly any archaeological sites scheduled in the period from 1920-1938. Yet, if an archaeological site was scheduled, it was prohibited (by § 4 DMSG 1923) to change its appearance and (physical) substance without prior permission by the BDA (§ 5 DMSG 1923).

Thus, the main means of protection of most – that is, all unscheduled – archaeology in the DMSG 1923 was a general duty to report finds to the BDA. The circumstances in which the find had been made did not matter if what had been found were objects which “due to their location, form or nature obviously could be subject to the restrictions of this law” (§ 9 DMSG 1923). Had such a find been made, the find site had to be left unchanged for up to 4 days, or less if a representative of BDA lifted this restriction (§ 10 DMSG 1923).

While the DMSG 1923 was hardly concerned with the protection of (unscheduled) archaeology, it did show considerable concern for the constitutional protection of the freedom of archaeological research: in its § 11, it contained a pre-emptive ‘excavation permit’ provision. Given that the restrictions of §§ 9-10 DMSG 1923 applied to all finds of archaeological objects, regardless of the specific circumstances of the discovery, even fully professional archaeological excavations would have been subject to the condition of § 10 DMSG 1923.

The pre-emptive permit of § 11 DMSG 1923 allowed the permit holder to continue their excavations immediately, as they saw fit, rather than having to wait for up to 4 days or for the single official of the BDA to lift this restriction any earlier. And since the constitutional freedom of research is a general civil right, equally guaranteed to any citizen (regardless of their training, experience or any other such considerations, see Berka 1999, p. 343), such a permit could indeed be granted to any citizen upon application according to § 11 DMSG 1923.

In simplified terms, the DMSG 1923 thus contained only minimal protections for unscheduled archaeology; stricter legal protections for any scheduled archaeological sites; and a strong protection of public participation in archaeological research. And given the reality on the ground, that was necessary: most of the actual fieldwork was, after all, conducted by citizen scientists. Participatory research, thus, was welcome at this time.

1.3. Law and practice until c. 1980

For the next half century or so (until c. 1980), law and practice remained mostly unchanged: for instance, the largest excavation recorded for 1971 in the *Fundberichte aus Österreich* [FÖ] was conducted in an early medieval cemetery in Mödling ‘*An der Goldene Stiege*’. This excavation, which recovered 249 burials (of 499 in total in this cemetery), was run and had its official finds report written by two citizen scientists, Hermann and Lotte Schwammenhöfer (1971). Even in the 1970s, excavations run by citizen scientists were still quite common.

Yet, change was coming, mainly because in 1970, metal detecting started to become a popular hobby in Austria (Karl 2016a). That is evident from the increase of reports for single coin finds between c. 1970–1984 (fig. 1).

Yet, in 1978, when the first major revision of the DMSG was passed, no changes were made regarding the protection of archaeology. This was at least partly due to the fact that a separate archaeological heritage law was planned at the time, but ultimately never passed by parliament.

So, instead of relying on a better law, the heritage professionals tried to address this problem by other means: a new commentary on the law, written by the permanent secretary for heritage in the Ministry of Culture, who simply re-interpreted the provisions of § 11 DMSG. It interpreted the ‘excavation permit’-regulation of the law as being a precondition for legal archaeological fieldwork; rather than a legal means to avoid having to stop unpermitted fieldwork (according to the provisions of § 10 DMSG 1923 and 1978) when any “*obviously*” protected archaeology was discovered. And since the commentary explicitly mentions metal detecting as an example where such a permit would be required (Helfgott 1979, p. 83), this re-interpretation was clearly aimed at prohibiting it.

However, legal commentary is not itself law; and thus, this interpretation had to be tested in the courts. And indeed, that is what the BDA did in 1982: it brought a case against a metal detectorist who had collected 8 Roman coins from the surface, but without a § 11 DMSG ‘excavation permit’, and been ‘caught in the act’ by a policeman. The BDA

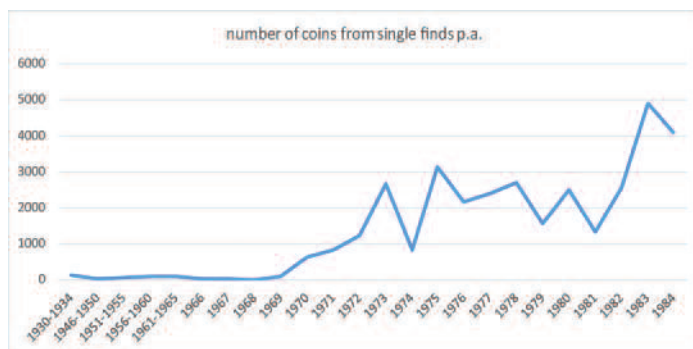


Fig. 1. Annual amount of coins from single finds (BDA 1934-1984; annual averages shown for periods 1930-34 and 1946-1965).

thus accused him of having conducted an illegal excavation; and indeed won the case both in the lowest and the appellate courts. However, the metal detectorist took the case to the Supreme Court (*Verwaltungsgerichtshof* [VwGH]), and won: in its landmark judgement (VwGH 24.6.1985, case file: 84/12/0213), the court interpreted 'excavation' as digging, not any fieldwork; explicitly stating that collecting surface finds requires no § 11 DMSG permit.

1.4. Restrictive laws and professionalization: c. 1985-2010

Apparently shocked by this defeat in the Supreme Court, the BDA thus changed its policy and started to lobby for a revised ('stronger') law. The immediate effect was that citizen scientists' help was no longer welcome: no excavations or other fieldwork by members of the public was permitted after c. 1985. Perhaps even more significantly, the next two major revisions of the DMSG, in 1990 and 1999, were aimed at prohibiting any citizen science involvement, and indeed any archaeological field research, by anyone other than archaeology graduates.

In 1990, the archaeological provisions were significantly rewritten. § 9 DMSG 1990 was rewritten to restrict the general finds reporting duty to 'chance finds' only. That also restricted the applicability of all duties to stop work upon discovery under § 10 DMSG 1990 to 'chance finds' only. § 11 DMSG 1990 was rewritten even more fundamentally, to now include all "excavations and any research *in situ* with the intent of discovering and examining archaeological monuments under the surface of the earth or water" in its 'excavation permit' requirement. This was clearly aimed at prohibiting metal detecting in the light of the 1985

Supreme Court judgement discussed above: given that the case had failed because the metal detectorist had credibly claimed not to have dug, including all research with the purpose of discovery in the new version of the law was a transparent attempt to extend it to non-invasive fieldwork also. In addition, the right to be granted an 'excavation permit' was also restricted: to archaeology graduates or persons with equivalent qualifications; with the latter having to be proven in an examination before a committee. This committee, however, was simply never established. With that, participatory research in archaeology had effectively been abolished.

This attempt at 'professionalizing' archaeological field research was pushed even further in the third major revision of DMSG in 1999. The new § 10 DMSG 1999 now re-defined all archaeological finds as 'treasure' (according to §§ 398-401 ABGB), and § 11 DMSG 1999 was further re-written to restrict the right to be issued an 'excavation permit' to archaeology graduates only. In addition, an exemption from the permit requirement for archaeology graduates employed at public universities, research institutes and museums, which had been included in the DMSG 1990, was also removed; leaving only an exemption for staff of the BDA itself (according to § 11 (2) DMSG 1999).

While the newly introduced definition of all archaeological finds as 'treasure' was explained in the government draft of the law as 'administrative streamlining' (RV 1999, pp. 53-54); it was actually aimed at preventing metal detecting. Since under the previous legislative solution, finds of portable antiquities of small monetary value became sole property of their finder upon discovery (by *occupatio*); there was no possibility for the state to confiscate them, even if extracted illegally. By re-defining all archaeological finds as 'treasure' according to § 398 ABGB, the punitive clause of § 401 ABGB became applicable to 'illegally' discovered finds, allowing the state to confiscate them.

The restriction of the right to be granted a § 11 DMSG 1999 excavation permit to archaeology graduates only, on the other hand, was justified explicitly in the context of participatory research. Again, in the explanations to the government draft, it is stated that extending the right to be granted an excavation permit to every citizen was no longer necessary, since "new models of enabling the public to participate in fieldwork directed by archaeology graduates have been developed", having "made the issuing of permits to non-graduates redundant" (RV 1999, p. 55). Yet, the BDA did not provide any such 'models', let alone opportunities to ordinary members of the public to participate in any archaeological fieldwork; with the only such opportunities being available at that time (and

mostly until today) being, mostly, post-excavation work offered by the *Stadtarchäologie Wien* (Strohschneider-Laue 1998a and 1998b). Thus, the freedom of archaeological research was completely abolished for nearly all Austrian citizens (over 99.98%; Aitchison *et al.* 2014, p. 19).

The removal of the exemption from the excavation permit requirement also was aimed at prohibiting participatory research. Again, this is justified in the explanations to the government draft of the law with the need to protect the Austrian archaeological heritage from non-BDA-controlled, 'unprofessional' fieldwork. In this case, it is particularly noteworthy: following Austria's accession to the European Union, Austria is required to treat universities from other EU countries exactly equal to Austrian universities. Thus, the exemption from the excavation permit requirement would also apply to archaeology graduates employed by public universities (etc.) in other EU countries, who might have received very different training than archaeologists which had graduated from Austrian universities. To prevent such 'unpermitted' excavations by archaeologists from other EU universities in Austria, the exemption had to be removed (RV 1999, p. 55). Thus, the freedom of archaeological research was also heavily restricted (see Berka 1999, p. 344) for all archaeology graduates, apart from those working for the BDA.

All of this was an attempt by the public officials in the Ministry and BDA to monopolise field archaeology for themselves, or at least to bring it under their control completely; especially the emerging 'commercial' archaeology. This, the BDA also tried to achieve in practice by creating 'private subsidiaries' – set up as charities, but controlled directly by public officials working in the BDA and their immediate relatives – which it lavishly supported with public funds, used its powers of office to ensure most commercial contracts were awarded to them, and allowed to work under the 'new' exemption for the BDA's own work according to § 11 (2) DMSG 1999 (Karl 2011a, pp. 110-127). This model of a particularly legally questionable public-private-partnership, based on a personal union and a good deal of nepotism centred around a handful of public service archaeologists, only came to an end when properly documented and reported to the then responsible Minister of Culture, who abolished significant parts of it by ministerial decree (Karl 2010, pp. 315-316).

1.5. It's more like guidelines anyway: from 2010 to the present

This ministerially enforced abolishment of the attempted monopolization of all archaeological field research and the opening up of the 'commercial market' to competition required the BDA to change its strate-

gies to prevent any truly participatory research. In 2010, it issued its first ‘Guidelines for archaeological measures’ (since revised on a biannual basis; BDA 2018), compliance with which it attaches as a firm condition to all § 11 (1) DMSG permits it issues. Until the 2016-2017 version (BDA 2016), it claimed that all excavations, but also all non-invasive surveys (magnetometer, GPR, etc.) and all surface surveys (field walking, visual inspection of landscape, etc.) “with the purpose of discovering and examining archaeology” require a § 11 (1) DMSG permit. It interpreted this to be applicable regardless of whether the site is scheduled as an (archaeological) monument, or even only any archaeology known from the place where fieldwork is to be conducted.

Even entirely non-destructive fieldwork that could not imaginably damage any archaeology *in situ* – like the purely visual inspection of the landscape for potential geomorphological or vegetation hints at the possible presence of archaeological features – was subjected to the ‘excavation permit’ requirement. In effect, these guidelines served to completely abolish any freedom of research in field archaeology: archaeological fieldwork could only be conducted by who the BDA wanted, where the BDA wanted, and how the BDA wanted; with any deviation from the BDA-decreed procedures having to be specifically justified in the permit application and explicitly permitted by the BDA before they could be implemented.

That, of course, also makes any truly participatory research impossible: to achieve real participation (Arnstein 1969), as implied in the right to freely participate in the cultural life of the community established in Art 27 of the Universal Declaration of Human Rights [UHDR], and explicitly established by Art. 1 (a), 4 (a and c) and 12 (a) of the Faro Convention (CoE 2005), self-determination of their activities by the individuals who hold these rights is an absolute necessity. Without this self-determination, which the BDA consistently has tried to deny anyone but its own staff, no freedom, neither of research, nor to participate in the cultural life of the community and benefit from the cultural heritage, exists; but only a state-agency imposed, authoritarian prescription that benefits only the state agency and its officials, while it harms the public and its interests.

1.6. Austria's international legal obligations

All of this is particularly remarkable because the Republic of Austria has committed itself to several international legal obligations to guarantee and enable its citizens to exercise the human right to participate in the cultural life of the community, and specifically their right to benefit

from the cultural heritage and contribute to its enrichment by ratifying two particularly important international conventions.

Remarkably, this commitment started pretty much at the same point in time that the BDA started to increasingly try to restrict and prohibit public participation in archaeological fieldwork: in 1978, Austria ratified (BGBl. 590/1978) the International Covenant on Economic, Social and Cultural Rights [ICESCR], the international convention turning the (in itself non-binding) UDHR into binding international law. The ICESCR states, in its Art. 15 (1), that “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications”, and in its Art. 15 (3) that “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity” (UN 1966).

Particularly the latter is, of course, the same Human Right as already guaranteed by Art. 17 StGG, which has been part of the Austrian constitution since 1923. It is also the same right as guaranteed by Art. 13 of the Charter of Fundamental Rights of the European Union (EU 2012, p. 398), which is also binding in and for Austria since it was first passed on 7 December 2000 (EU 2012, p. 407). As such, one would tend to think that a human and civil right, guaranteed twice in binding international law and also in national constitutional law, could not simply be voided by ordinary law or administrative act, as the BDA has attempted to increasingly do since 1979. One might think so even more since the Austrian Supreme Constitutional Court, the *Verfassungsgerichtshof* [VfGH], has explicitly stated that the freedom of research is indeed an ‘absolute’ civil liberty that cannot be restricted by either (Berka 1999, p. 345).

The former, on the other hand, is reaffirmed by the Preamble and Art. 1 (a) and 4 (a and c), and is further specified by Art. 12 (a) of the Faro Convention. That convention has been ratified by Austria in 2015 (BGBl. III 23/2015), and it specifically states that “rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights”; that “everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment” and that “exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others”; and that Parties to the Convention “undertake to: (a) encourage everyone to participate in: - the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage” (CoE 2005).

Guarantees of participatory civil liberties by law	Rights and encouragement to participate in practice
before 1867: none	before 1923: no restriction, strong encouragement
1867-1923: by ordinary law	
1923-1933: by constitutional law	1923-1978: slightly restricted rights, some encouragement
1934-1945: none	
1945-1977: by constitutional law	
1978-2000: by constitutional and international law	1978-1990: slightly restricted rights, no encouragement
	1990-1999: heavily restricted rights, discouragement
2000-2015: by constitutional, European and international law	2000-2009: no rights, strong discouragement
	2010-present: no rights, total prohibition of participation
2015-present: by constitutional, European and international law and a European Heritage Convention (Faro)	

Tab. 1. A juxtaposition of legal guarantees of participatory civil liberties in heritage and practical rights and encouragement to participate in practice.

1.7. A juxtaposition: guarantees of civil liberties and their encouragement in practice

If one compares and contrasts the development of international and constitutional legal guarantees of the civil liberties required for benefiting from the cultural heritage and to contribute to its enrichment with the rights to do so provided in ordinary law and administrative practice, a remarkable pattern emerges (tab. 1).

While participatory civil liberties are increasingly being guaranteed, first in ordinary national, then in constitutional national, and finally in international law of the highest order, the development of ordinary heritage law, and particular administrative practice in archaeological heritage management is moving in the opposite direction. While the development of the high-level guarantees of participatory civil liberties is perfectly in line with the replacement of the older, authoritarian-hierarchical by a 'democratic' liberal-egalitarian social order based on the rule of law; archaeological heritage management is becoming increasingly authoritarian-hierarchical in its organisation, to the point that true participatory research in Austrian field archaeology has become virtually impossible for anyone but a handful of civil service archaeologists in the BDA.

2. The law is the law, but its interpretation variable

The virtually diametrically opposed directions of developments do, however, raise an important question. Is it really the law, or just its interpretation and implementation in practice by the BDA, that has developed in the opposite direction to the Republic of Austria's high-level national and international commitments to guarantee and enable the exercise of participatory civil rights in archaeological research?

While the law is the law, it can be interpreted quite differently by different parties; including the possibility that it is interpreted fundamentally differently by 'ordinary' citizens (like I) and the state agency tasked with enforcing it. In fact, that disputes about the interpretation of a law arise is perfectly normal. If such disputes arise, they need to be resolved, and the way to resolve them is to take such matters to court. It is just in archaeological matters, especially under management regimes that require permits of those who want to engage in fieldwork and thus depend on the state agency which can withhold them, that those most affected by the restrictions of their civil liberties are unlikely to defend them in court: after all, should they fail, they risk their future livelihood, or at least their future in archaeology. It thus falls to emigrant professors who do not depend on any such permits to take such matters to court; and thus, this is what I did. Repeatedly.

2.1. *The case of the curious burial of Santa 'Klausel'*

The first step I took to test the interpretation of the DMSG as implemented by the BDA was to create an experiment in 'heritage crime' in 2013. Since I did not want to destroy 'real' significant archaeology for this experiment, I had a monument¹ specifically created for this case.

For this purpose, I bought a ceramic bust of Santa Claus² in a poundshop in Bangor (Wales, UK; fig. 2) and brought it with me on a journey to Austria. There, I had my wife bury, in my absence, this bust under an artificially created 'soil formation' of her own choosing in my parent's garden in Vienna, thereby creating an absolutely unique 'monument' accord-

¹ A monument according to the definition of the term in § 1 (1) DMSG 1999 and the legal commentary by the current permanent secretary for heritage at the Austrian Ministry of Culture (BAZIL *et al.* 2004 and 2015) is any man-made object (or its remains or traces, including artificially created or transformed soil formations) of historical, artistic or other cultural significance, whose preservation is in the public interest because of this significance. Such a public interest definitely exists if the particular man-made object (or 'monument') in question is unique or rare, its significance exceeds that of other comparable objects considerably, or if it is a particularly good or well-preserved exemplar of a particular kind or type of monument (BAZIL *et al.* 2015, p. 20; cf. RV 1999, p. 37).

² Which I nicknamed 'Klausel', being both a diminutive form of the name *Klaus* ('Claus') in German and the term used for a legal 'clause'.



Fig. 2. The author, acquiring 'Klausel' in a pound-shop in Bangor, UK (image: Sonja-U. Prochaska).

ing to the definitions of the term in § 1 (1 and 2) DMSG (fig. 3). I then proceeded to "research" it "in situ with the purpose of discovering and examining" this archaeological monument "under the surface of the earth or water" by a visual survey, followed upon its discovery by its "excavation by hand" and "with tools"³ (fig. 4); but without the allegedly required permit by the BDA according to § 11 (1) DMSG.

That this whole 'experiment' took less than an hour in total to complete, with the 'monument' having existed for little more than 20 minutes before being destroyed by my excavation⁴, technically does not matter: under the provisions of the DMSG, the absolute age of a 'monument' is not a relevant consideration in the determination of the existence of a 'public interest' in its preservation⁵. Thus, if the BDA's interpretation of the applicability of § 11 (1) DMSG 1999 to all archaeological field research (BDA 2016, p. 6) had been correct, this little 'archaeological Easter egg hunt' would have constituted as much a 'heritage crime' against the permit requirement as any other excavation (and other research *in situ*) for the purpose of discovering archaeological monuments without the allegedly re-

³ It was consciously decided to partially excavate this monument by hand (that is, without the use of any 'tools'), and partially using 'tools', since this had been the definition of an 'archaeological excavation' given in the Supreme Administrative Court judgement already discussed further above (VwGH 24.6.1985, case file: 84/12/0213, 4).

⁴ This whole process, as can be seen especially in fig. 4, was properly recorded to create indisputable evidence of this activity having actually happened.

⁵ That absolute age is no consideration in the determination of the significance of a 'monument' was also established in the same Supreme Administrative Court judgement already discussed further above (VwGH 24.6.1985, case file: 84/12/0213, 3).



Fig. 3. The author's wife, creating the 'artificial soil formation' – a mini-tumulus surrounded by a circle of smaller and crowned by a slightly larger specimen of 'standing pebbles' – in the author's parents' garden in Vienna (image: H. Karl).



Fig. 4. The author, 'illegally' excavating the 'monument' c. 20 minutes after its creation (image: H. Karl).

quired permit. All elements of this experiment were created to make it comparable to all other archaeological field research on non-scheduled archaeological sites, that is, sites that are not protected by the DMSG 1999 any more than they were under the DMSG 1923.

Having committed this heinous 'heritage crime', I waited a few days (to also violate the reporting duty for 'chance finds' as determined by § 8 (1) DMSG 1999) before reporting myself by email to the prosecuting authority responsible for this case, the Vienna city council (*Magistratisches Bezirksamt für den 1./8. Wiener Gemeindebezirk* [MBA 01]). To ensure that the BDA was also aware of the 'heritage crime' I had committed, I also copied the head of archaeology into that email. My self-indictment contained all necessary evidence to prove beyond any reasonable doubt that I had indeed committed the described activities, as well as an explanation why what I had done was entirely legal.

Early in 2014, the MBA 01 notified me that the case against me had been dropped, explaining its decision by reference to § 45 (1.1) Administrative Penal Code (*Verwaltungsstrafgesetz* [VStG]; MBA 01 11.3.2014, case file: MBA 01 – S 48902/13). That particular provision of the VStG states, specifically, that a case must be dropped if it cannot be proven that the accused had committed the actions he was charged for, or his actions did not constitute an administrative offence at all. Since I had supplied ample evidence (including, of course, a written 'confession') that I had indeed committed the actions I had indicted myself for, the only possible explanation for this decision was that the actions I had taken do not constitute an administrative offence. And that should hardly have come as a surprise to anyone: after all, the DMSG only protects scheduled archaeology, and the site I had researched and excavated had never been scheduled.

Interestingly, the BDA did not respond to two separate invitations sent to it by the MBA 01 to comment on the case (as is its right, and arguably its duty, according to § 37 (8) DMSG 1999). Neither did it appeal the decision, despite the fact that it clearly could have done so, given that it later claimed that it had never heard of the case.

The outcome of the case thus demonstrated, even if only in the lowest possible courts, that the excavation of non-scheduled monuments in Austria is not subject to the 'permit requirement' of § 11 (1) DMSG 1999. Yet, when I informed my Austrian colleagues of the outcome and consequences of the case, the BDA objected and maintained that all excavations were subject to the permit requirement of the law; despite refusing to explain why it was of that legal opinion. In practice, it simply continued to apply the law as it had before.

2.2. The case of the illegal surface survey 'excavation permit' for my parents' garden

Following a few years of arguments with the BDA in which I tried to find out why it interpreted § 11 (1) DMSG 1999 in the way it does, I decided that another test case had to be brought; but this time in higher courts. I have already discussed this case in greater detail elsewhere (Karl 2018a) and thus will only provide a very short summary of it here.

Conveniently, the 'permit requirement' of § 11 (1) DMSG itself provides an opportunity to appeal to higher courts than the local council: since the granting or refusal of an 'excavation permit' is an official administrative decision, it can be appealed if the applicant feels his rights have been violated by it. Such appeals go to the Austrian Federal Court of Administrative Appeals (*Bundesverwaltungsgericht* [BVwG]), the second highest administrative court in the land.

Thus, I applied in April 2017 for a § 11 (1) DMSG 1999-'excavation permit' for a survey to collect surface finds in my parents' garden in Vienna, specifically stating – already in my application – that there is no reason whatsoever to believe that any archaeology exists on that particular plot of land. I also explained in detail why I believed the BDA had no jurisdiction for my planned activities whatsoever (quoting, amongst others, the already discussed landmark case VwGH 24.6.1985, case file: 84/12/0213 in support of my argument), and that it thus would be required by law to reject my application due to lack of jurisdiction.

Despite this, the BDA issued me a permit in June 2017; including as a condition full compliance with its 'guidelines' (BDA 2016). I appealed this permit at the BVwG in July 2017.

As expected (and indeed fully in line with previous Supreme Court judicature), the BVwG decided the case in my favour in September 2017, fully upholding my core argument (BVwG 11.9.2017, case file: W183 2168814-1/2E). Referencing two Supreme Administrative Court judgements, the one already repeatedly mentioned having found that surface surveys on non-scheduled sites do not require a permit (VwGH 24.6.1985, case file: 84/12/0213), and another more recent one which had found that § 11 (1) DMSG 1999 is inapplicable on sites where no known archaeology exists (VwGH 23.2.2017, case file: Ro 2016/09/0008), it explicitly stated that the law and Supreme Court judicature on the matter was entirely clear. As such, it did not allow an ordinary appeal, and no extraordinary appeal was brought by the BDA, making this judgement legally binding.

Of course, that judgement, particularly in combination with the latter Supreme Administrative Court judgement just referenced (VwGH 23.2.2017, case file: Ro 2016/09/0008), has significant wider implications; or at least, it should have. After all, the two judgements, taken together, mean that no activities fall under the jurisdiction of the BDA if there is no serious reason to believe that significant archaeology will be discovered. This is even the case for intentional excavations.

As a consequence, the BDA did change its 'guidelines' (BDA 2018, p. 6), albeit in such a miniscule and confusing manner that the strong impression is created that an 'excavation permit' is still required for all archaeological fieldwork; with possibly the sole exception of the removal of surface finds from non-scheduled sites (BDA 2018, p. 10). The BDA continues to pretend that its misinterpretation of the law is correct despite opposing judicature; and indeed continues to issue 'excavation permits' according to § 11 (1) DMSG 1999 even in cases where it has clearly been established that it does not have jurisdiction.

And that is a serious problem.

2.3. The case of the illegal 'excavation permit' for excavations in my parents' garden

So I brought yet another case to court. In January 2018, I once again applied for a permit for planned archaeological 'measures' in my parents' garden in Vienna. This time, these were a full archaeological assessment of the 'site'; and were planned to be started with a metal detector survey, then to proceed to a magnetometer and a ground penetrating radar survey, and finally progress to a full excavation of a 10 by 10 meter trench. In my application, I once again pointed out (by reference to existing judicature as well as to the fact that still, there was no reason to believe any archaeology exists on the plot of land in question) that the BDA could not have jurisdiction in this case, and therefore must reject my application⁶.

Despite this, the BDA once again proceeded to issue me a permit in April 2018 (BDA 25.4.2018, case file: BDA-61408.obj/0003-ARCH/

⁶ This requirement to reject my application if lacking jurisdiction is due to the provision of Art. 18 (1) B-VG: "All public administration must only be exercised according to the law". This provision establishes one of the most important pillars of the Austrian constitution: it literally establishes the 'rule of law', restricting the Austrian state, all its agencies, and its officials to act only in accordance with the law when dispensing their respective duties; thereby prohibiting any state action without proper legal basis. This is what makes Austria a democratic republic, and thus is absolutely fundamental to its political, social, and legal order.

2018). Again, it made full compliance with its 'guidelines' (BDA 2018) a firm condition of the permit. Hardly surprisingly, I also appealed this decision.

The judgement of the BVwG in this case, passed in September 2018, also went in my favour⁷, explicitly repeating the central argument of the Supreme Administrative Court in its 2017 judgement (VwGH 23.2.2017, case file: Ro 2016/09/0008) that it is a necessary precondition for the applicability of § 11 (1) DMSG 1999 that there is at the very least an expectation of finds to be made. Given that I had no such expectation (which I had repeatedly stated, including in the oral arguments before the BVwG), there was no substance to my application and the BDA would have had to reject it on these grounds alone. Thus, the BVwG upheld that the BDA had illegally issued the permit.

3. Public participation and the law

One can summarise the results of these cases in quite simple words: hardly anything has changed since the DMSG was originally passed in 1923. If anyone wants to dig where there is no particular reason to believe any significant archaeology will be found, they can do so to their heart's content, without needing anyone's but the landowner's permission for doing so. Only if someone who wants to do fieldwork believes that they will probably discover significant archaeology during it, they can apply, pre-emptively, for a § 11 (1) DMSG 'excavation permit', which, if granted, exempts them from the requirement of § 9 (1) DMSG to stop if they – whether by accident or design – actually discover any significant archaeology during it. The only real difference to the 1923 in the 1999 revised version of the DMSG is that it is no longer anyone who can apply for and be granted such a pre-emptive 'excavation permit', but only archaeology graduates.

This leaves just one question: what is 'significant' archaeology, and when does anyone wanting to conduct fieldwork have to have reason to believe they are likely to find archaeology of such significance that its preservation is "*obviously*" (§ 8 (1) DMSG 1999) in the public interest and thus subject to the provisions of the DMSG 1999 at all?

⁷ Though arguably, I won this case – which I incidentally hoped to at least partly lose to be able to appeal to the Supreme Constitutional (VfGH) or at least the Supreme Administrative Court (VwGH) – completely for mainly technical legal reasons, rather than on the merits of the case (BVwG 19.9.2018, case file: W195 2197506-1/11E).

3.1. *The intractable problem of determining archaeological significance ex ante*

This very question leads us to an intractable problem: § 8 (1) DMSG 1999 defines the term ‘archaeological monument’ as objects discovered “beneath the surface of the earth or water, which due to their location, form, or composition⁸ could *obviously* be subject to the restrictions of this law (archaeological monuments)” (emphasis: RK). Thus, to correctly determine whether a § 11 (1) DMSG permit is required for archaeological fieldwork, a prerequisite question must first be answered: will the planned fieldwork probably discover objects of such significance that their preservation “*could obviously*” be in the public interest? But answering this prerequisite question is virtually impossible, especially for ordinary citizens.

According to Supreme Court judicature, the legal question of whether an object is subject to the restrictions of the DMSG has to be answered based on (ideally a public official’s) expert testimony regarding its significance (Bazil *et al.* 2015, pp. 22-23 with references to relevant judicature). That expert testimony is required because significance depends exclusively on the predominant appreciation of the particular object by (academic and professional) experts (Bazil *et al.* 2015, pp. 17-18). However, ordinary citizens, by definition, lack the expertise required to determine this, and thus normally cannot even correctly determine whether any object they already have found is subject to the restrictions of the DMSG, let alone any object they might be (re-) searching for.

What makes matters even worse for undiscovered archaeology, however, is that the significance in case of ‘archaeological monuments’ according to § 8 (1) DMSG has to be determined based on their location, form, and/or composition. However, the location, form, or composition of any object cannot be known, and thus also cannot be assessed, until it is discovered. As such, as long as an object is undiscovered, it is impossible for anyone, including heritage experts, to determine whether its significance is such that it could, let alone “*could obviously*”, be subject to the restrictions of the DMSG due to these criteria.

⁸ A note of caution on the translation of the criteria “location, form, or composition”: the German original speaks of “*Lage, Form oder Beschaffenheit*”. Of these, the first and last cause some difficulty, as their meaning in the context of § 8 (1) DMSG cannot be directly translated into English without some loss of information. *Lage*, while translated here with the English term ‘location’, is somewhat ambiguous: it can refer to the *location* of an object in geographical terms (e.g. on a scheduled site), but also to its precise *position* in the ground (e.g. in a stratified archaeological context). *Beschaffenheit* is equally problematic for somewhat different reasons: while it is translated here as ‘composition’ (as in ‘the materials it is made of’, but also ‘the way it is designed or decorated’), it can mean virtually any characteristic features it may have (e.g. that it is a heavily corroded and fragmented metal object) which could give reason to believe it may be a ‘man-made object of historical, artistic or other cultural significance’.

Indeed, the problems with the legal definition of the term 'archaeological monument' have been recognised before, most recently by Erika Pieler (the judge at the BVwG who found in BVwG 11.9.2017, case file: W183 2168814-1/2E), who has discussed the difficulties with determining correctly what an 'archaeological monument' actually is in a recent academic contribution. While she argues that presumably, virtually everyone would recognise that a newly found Roman bronze helmet is of such significance that it would "*obviously*" be subject to the restrictions of the DMSG, she also explicitly states that with many other archaeological finds (like Second World War finds), this is much less clear (Karl *et al.* 2017, pp. 111-112).

While Pieler's argument certainly has some merit in that most people would probably recognise at least some archaeological finds as sufficiently exceptional that they merit protection, there are some serious problems with this. For instance, even Roman bronze helmets (or similarly "*obviously*" exceptional objects) are rarely found in a state of preservation to be immediately recognised as what they are by ordinary citizens. But even more importantly, modern archaeology as a discipline is no longer primarily interested in exceptional finds, but rather in archaeological contexts. It can hardly be expected of ordinary citizens to recognise that contexts are significant, let alone which of them are so significant that they "*could obviously be subject to the restrictions*" of the DMSG.

But even if one accepts Pieler's argument that at least some (particularly noteworthy) archaeological finds would be recognised by virtually everyone as worthy of preservation, the problem still remains that no one can, with any reasonable degree of probability, predict whether any unknown objects they intend to find will be a Roman bronze helmet (or another similarly "*obviously*" significant object); except perhaps when they intentionally excavate a known Roman soldier's tomb. Thus, to be (re-) searching with the purpose of discovering objects which fall under the legal definition of the term 'archaeological monuments' of § 8 (1) DMSG, and thus to require an 'excavation permit' according to § 11 (1) DMSG, the individual planning fieldwork would need to specifically be searching for e.g. Roman bronze helmets (or similarly significant objects); or indeed search with the specific intent to discover 'man-made objects of such significance that their preservation is in the public interest'.

However, while anyone who conducts archaeological fieldwork will normally intend to discover archaeology, hardly anyone, whether professional archaeologists or interested members of the public, ever actually conducts archaeological fieldwork with the specific intent to discover what the law defines as 'archaeological monuments'. Rather, most often, they are (re-) searching for any kind of archaeology, or any archaeology which

will allow them to answer any particular research question they have. And from a legal perspective, it is entirely clear that it is not 'all archaeology' which falls under the legal definitions of the terms 'monument' in § 1 (1) DMSG or 'archaeological monument' in § 8 (1) DMSG, and thus is subject to its restrictions, but only some; namely, that which is of such significance that its preservation is in the public interest.

That this is, in fact, the case is "*obvious*" from the BDA's own scheduling practices: of the c. 21.730 archaeological sites in Austria currently known to the BDA, only c. 1.050 have been scheduled⁹. Yet, the BDA has no administrative discretion where scheduling is concerned: if archaeology is of such significance that its preservation is in the public interest, it must schedule it (Bazil *et al.* 2015, pp. 19-20). Thus, the fact that only c. 5% of all known sites in Austria are scheduled proves positively that only some archaeology is of such significance that its preservation is in the public interest. Thus, the restrictions of the DMSG cannot apply to all archaeology, nor to all research to discover 'any' archaeology¹⁰, but only a particular subset of 'all' archaeology.

Whether archaeology which "*obviously*" belongs to this subset – the only archaeology to which the restrictions of the DMSG, including those of its § 11 (1), apply – will probably be found during planned archaeological fieldwork thus can be determined *ex ante* in one way only by checking in advance whether a site is already scheduled as a monument (or is in the process of being scheduled, and probably also if it is already listed as a World Heritage site¹¹). Only there it is predictable that further finds

⁹ Pers.comm. HR Univ.-Doz. Dr. Bernhard Hebert, Head of Archaeology, BDA on 24.4.2018.

¹⁰ Indeed, in this context, *contra* Pieler's argument that anyone would recognise that Roman bronze helmets are "*obviously*" significant, thus making them 'archaeological monuments' according to the definition of § 8 (1) DMSG (KARL *et al.* 2017, pp. 111-112), it is noteworthy that the BDA has not scheduled a single Roman helmet in the 95 years it has had scheduling powers, despite quite a few having been found in Austria during that time. Thus, it is "*obviously*" the continual jurisdiction of the BDA regarding finds of Roman helmets that their significance (regardless of their composition and location when found) is insufficient for their preservation to be in the public interest. And since, due to the constitutional principle of equality (Art. 7 B-VG; Art. 2 StGG; Art. 66 (1-2) Treaty of St. Germain), their own continual jurisdiction binds Austrian public authorities' future decisions (BERKA 1999, pp. 543-548, especially p. 547), it can be assumed by citizens that, since the BDA in the past 95 years has judged in all cases that newly discovered Roman helmets are not subject to the restrictions of the DMSG, it will continue to arrive at the same judgement in any future case of a new discovery of a Roman helmet. This, in turn, would mean that even archaeological fieldwork with the purpose to discover, specifically, Roman bronze helmets, would not constitute archaeological fieldwork with the purpose of discovering 'archaeological monuments' according to the legal definition of this term in § 8 (1) DMSG, and thus would definitely not require an 'excavation permit' by the BDA according to § 11 (1) DMSG.

¹¹ Remarkably, not all Austrian archaeological sites which are part of World Heritage sites are scheduled; and being part of a World Heritage site does not provide any legal protection to an unscheduled archaeological site in Austria. However, since any such non-scheduled archaeological site which has been designated as World Heritage is obviously very significant – after all, it would hardly have been designated as a part of a World Heritage site if it had no outstanding universal value – it would prob-

which “could obviously be subject to the restrictions of the DMSG” will be made during archaeological fieldwork; which makes them the only sites in Austria where anyone can form the intent to discover ‘archaeological monuments’. And since it is only this intent which triggers the applicability of § 11 (1) DMSG, its provisions can only apply to fieldwork on such sites.

3.2. Interpreting the law in line with the judicature

Where autonomous public participation in archaeology in line with the human right to participate in cultural heritage as defined by Art. 15 (1) ICESCR and Art. 1, 4 (a and c) and 12 (a) of the Faro Convention (CoE 2005) is concerned, there thus is only one possible interpretation of the DMSG and the ‘excavation permit’ requirement consistent with the existing judicature: in Austria, apparently (at least to the courts), self-determined public participation in archaeological research is freely permitted on all land which is not scheduled (as an archaeological site) without the need for any permit¹².

ably be deemed reasonable by the Courts that anyone wishing to conduct archaeological fieldwork on such a site should have assumed that it “could obviously be subject to the restrictions of the DMSG”, even if the BDA had not yet scheduled it.

¹² This is also conversely confirmed by § 37 (6) DMSG. This – it is an exemption contained in the penal provisions attached to the DMSG – states that if a prosecution for suspected violations against the DMSG has already been started, it must be dropped if the BDA determines (by official letter) that no public interest in the preservation of the affected object exists or existed (at the time of the suspected offence) (or retrospectively permits the activity). While the commentary refers to this requirement to drop prosecutions under these circumstances as “*mistaken legislative policy*” (BAZIL *et al.* 2015, p. 112), it is actually a both logically and legally necessary consequence of the definition of the applicability of the DMSG in the first sentence of its § 1 (1) “The provisions in this federal law apply to ... (‘monuments’), provided their preservation is in the public interest ...”. Given that the law is perfectly clear that all of its provisions are completely inapplicable to any objects whose preservation is not in the public interest, it follows inescapably that there is no legal basis to be found in the DMSG for penalising anyone for doing anything with any such object. Thus, the principle of *nulla poena sine lege* (Art. 11 (2) UDHR; Art. 7 European Convention of Human Rights [ECHR]; § 1 Austrian Penal Code (*Strafgesetzbuch* [StGB]); § 1 (1) VStG) must apply.

Where any (re-) search to discover non-scheduled archaeology is concerned, this is relevant for two reasons: 1) since the ‘automatic scheduling by legal presumption’ of § 9 (3) DMSG of ‘archaeological monuments’ (as per the definition of § 8 (1) DMSG) explicitly starts only at the moment of their discovery, any (re-) search with the intent to discover any such monument cannot legally be punished, even if it had been conducted without a § 11 (1) permit and such a permit would have been required at all. After all, at the time the intent to discover had been formed and the (re-) search for the purpose of discovery been conducted, no public interest in the preservation of the object that was being (re-) searched for existed. 2) According to § 9 (5) DMSG, all the provisions of § 9 also apply for excavations which have been conducted in violation of the provisions of § 11 DMSG. Thus, ‘automatic scheduling by legal presumption’ according to § 9 (3) also applies to any ‘archaeological monuments’ discovered during excavations conducted in violation of the permit requirement of § 11 (1) DMSG. However, § 9 (3) DMSG also compels the BDA to decide (by official letter) within a period of 6 weeks from the date any relevant finds of ‘archaeological monuments’ came to the attention of a relevant authority (ultimately, the BDA) as to whether the temporary protection provided by ‘automatic scheduling by legal presumption’ is to be extended indefinitely; that is, to decide whether to schedule the particular monuments by a separate administrative act in accordance with normal ‘scheduling by official letter’ procedures as per § 3 (1)

This freedom to conduct self-determined archaeological fieldwork certainly fully extends to surface surveys (field walking, visual inspection, etc.). The only duty of the person conducting such fieldwork under the DMSG during such surveys is that any finds of 'archaeological monuments' are properly reported to the BDA according to § 8 (1) DMSG no later than the next working day. In addition, if portable 'archaeological monuments' are found during such surface surveys, these have to be immediately recovered by their finder for safekeeping according to § 9 (2) DMSG, with these portable antiquities being automatically 'scheduled by force of legal presumption' from the moment of their discovery until 6 weeks after their discovery has been reported according to § 9 (3) DMSG.

The same freedom also extends to any other archaeological fieldwork on land which is not scheduled (as an archaeological site), whether the methods used are non-invasive (magnetometer, GPR, etc.), or invasive (excavations, soil sampling, etc.). During such fieldwork, the same duties as just mentioned apply. In addition, if 'archaeological monuments' are discovered during invasive work, all work on site which could affect these monuments or their surroundings must be stopped for up to 5 days or until an official of the BDA lifts this restriction according to § 9 (1) DMSG any earlier.

Permits according to § 11 (1) DMSG are only required for planned archaeological fieldwork on scheduled archaeological monuments. On any such site, any object which is part of (or indivisibly connected) to the scheduled monument, including surface finds, is also (automatically) scheduled according to § 1 (9) DMSG, and thus the probability that the preservation of any object found on them will be in the public interest almost 100%¹³. Thus, it is indeed necessary under the law to apply for and be issued a § 11 (1) permit for (at least invasive¹⁴) archaeological fieldwork on such scheduled sites; which, according to the current letter

DMSG. If it does not issue such an official scheduling letter within that 6 weeks' respite, it effectively (even by complete inaction) determines that no public interest in the preservation of the affected objects exist. Thus, unless the site the (re-) search was conducted on was already scheduled beforehand, the preservation of the affected objects neither was in the public interest at the time the alleged offence was committed, nor – since the BDA hardly ever indefinitely extends the temporary scheduling – is its preservation normally still in the public interest after the 6 weeks respite runs out. Thus, prosecutions for excavations without a § 11 (1) DMSG are – at least in theory – bound to virtually always fail.

¹³ The only exception to this being modern objects (lost property or discarded current rubbish), which may be removed from the monument despite its scheduled status.

¹⁴ Whether a permit requirement for non-invasive fieldwork – which, due to its non-destructive nature, cannot threaten monuments with "destruction, change or transfer abroad" (§ 1 (1) DMSG), which is what the DMSG actually aims to prevent – can be constitutional is another question. After all, to restrict a fundamental and unconditionally constitutionally guaranteed civil liberty like the freedom of research at all, its unrestricted exercise must seriously threaten an equally constitutionally protected common good (BERKA 1999, p. 346), and non-invasive and thus also non-destructive research cannot imaginably do so. Thus, any legal restrictions imposed on any non-invasive archaeological fieldwork are probably unconstitutional and thus inapplicable.

of the law, can only be issued to archaeology graduates; and as specified in § 11 (5) DMSG, also a permit according to § 5 (1) DMSG permitting them to change a scheduled monument.

In addition, archaeology graduates may also apply for and be granted pre-emptive permits according to § 11 (1) DMSG for planned archaeological fieldwork for the purpose of discovering and examining archaeology on unscheduled sites where archaeology is already publicly known to exist, provided they have a reasonable expectation that they are likely to find 'archaeological monuments' as defined in § 8 (1) DMSG. In such cases, where, based on their own professional judgement, a public interest in the preservation of at least some of the archaeology they expect to discover is likely to exist on the balance of probabilities, the § 11 (1) DMSG permit according to § 11 (5) permits them to change or destroy any monuments they do actually discover to the extent which is required for and unavoidable in the process of scientific archaeological excavation. However, in these circumstances, since no already scheduled monument is being affected by their works, they do not need a permit according to § 5 (1) DMSG, since they are not changing any scheduled monument, but excavating unscheduled archaeology unprotected by law.

Thus, archaeological research in Austria is mostly free according to the law, and restricted significantly only on scheduled monuments, much like it should be, from a constitutional and human rights perspective. It is thus not the law at all which prevents participatory research in Austrian archaeology; it is only the arbitrary and demonstrably illegal and unconstitutional interpretation of the law by the Austrian National Heritage Agency.

4. An alternative approach to archaeological quality assurance

If anyone may dig (almost everywhere) for archaeology unless they intend to and have reason to believe that they will find 'archaeological monuments' of such significance that their preservation is in the public interest, this does, however, raise the issue of archaeological quality assurance. While the BDA's officials clearly disregard (or seriously misinterpret) the law, I know (knowing most of them personally) that they do so because they want to assure that archaeology does not get wrecked by being ripped out of the ground unprofessionally.

The fear of such damage may be somewhat overblown, as is indicated by the fact that the law in England and Wales is almost identical to the Austrian DMSG in that anyone may dig almost anywhere for archaeology without English and Welsh archaeology suffering noticeably greater damage than the archaeology in any other European country. The actual ar-

archaeological damage caused by unprofessional excavations of archaeology (often also referred to as 'looting' within the discipline) may well be nowhere nearly as dramatic as we tend to believe (see for Austria, Karl 2018b). But even if it is not as dramatic as many archaeologists believe, at least some archaeological damage is certainly done by members of the public who do conduct archaeological fieldwork unprofessionally. Thus, archaeological quality assurance must be a concern.

Thus, the truly relevant question for participatory research in archaeology is: how can we protect both participatory Human Rights and the archaeological heritage?

I believe that this aim can best be achieved by prohibiting by law self-interested activities which wantonly damage, but freely permit participation which contributes to the enrichment of the archaeological heritage. Or, in other words: by linking the legality of actions (like participatory research) directly to competent performance.

For how this could actually be achieved reasonably effectively, I think it is first necessary to take a short look at the psychology of legal compliance, before looking at an alternative proposal for archaeological quality assurance I have made in Austria, and how, by applying compliance psychology, one might actually achieve the desired outcome more effectively than currently.

4.1. The psychology of legal compliance and archaeological quality assurance

People want to participate in and conduct self-determined archaeological fieldwork for a plethora of individually different reasons, as various recent studies have shown (for Austria, see e.g. Karl 2011b, p. 122; for Germany e.g. Jung 2010; for Norway e.g. Munch Rasmussen 2014). As such, we have struggled to find working levers to achieve legal compliance for most people who want to search (and dig) for archaeology.

Still, different as their motivations may be, virtually all individuals searching for archaeology, whether professional archaeologists or not, all share one common aim: they all want to acquire lawful possession (or even ownership) of their finds (or other discoveries). In some cases, this possession may only be intended to be temporary (e.g. to record or donate them to a museum), in others may be primarily transactional (e.g. to sell finds to collectors or museums), or be intended to be indefinite (e.g. to add finds to their own private collection)¹⁵. Even an individual en-

¹⁵ The intent to acquire indefinite possession is frequently, from the subjective point of view of the individual intending to acquire indefinite possession, construed as an attempt to create a 'permanent'

gaging in the extraction of finds just to spice up an otherwise ordinary stroll by the 'thrill' of discovering 'something', ultimately aims to take possession, however fleetingly, of everything they happen to find, and may well want to take home some fancy memento of that 'thrilling' moment, i.e. acquire ownership of at least some of it. 'Finding' to 'do something with' the archaeology is what all these individuals want, and that requires, at the very least, to acquire possession.

Stopping people by law from trying to get what they want is always at least very difficult: the heart wants what the heart wants. Legal prohibitions, coupled with penalties, thus are largely useless in detaching potential offenders from committing 'heritage crimes'.

Even brutal enforcement of violently punitive laws has long been known to be mostly ineffective. Already in 1778, German criminologist and penal law reformer Carl Ferdinand Hommel (1722-1781) wrote in a comment to his translation of his Italian colleague Cesare Beccaria's (1738-1794) celebrated study on penal law, *Dei delitti e delle pene* (1764): "To him who wants to see thieves hanged, I well-meaningly recommend to button his pockets and leave his watch at home. Since there is thieving going on beneath the gallows, which would not be possible if the severity and visibility of punishment could prevent anything from happening" (Hommel 1778, p. 110; translation: RK). As Hommel also already remarked in the same footnote: as long as potential offenders (have reason to) believe they will not be caught, even capital punishment does not act as an effective deterrent.

Particularly where compliance with the archaeological provisions of heritage laws are concerned, which are virtually unenforceable, with offenders normally simply not getting caught¹⁶, punitive prohibitive legal

collection; that is, one that survives (and in some way immortalises) them. Thus, it is frequently combined with the intent to ultimately donate or (perhaps even more commonly) bequest it to some (most often local) public museum as that individual's contribution to the public good. Despite the fact that in reality, this only rarely actually happens in the end, and that in some cases, it may be little more than a socially acceptable justification, used by 'looters', for their self-serving extraction of archaeology *ex situ* for, mainly, its transactional value, many such 'collectors' indubitably are sincere in professing this intent. The same applies for many metal detectorists, who are also perfectly sincere when they profess their intent to be to preserve small finds 'in perpetuity' or 'for posterity' which would otherwise be lost to damage by ploughing, aggressive fertilisers, or natural causes, even if their actual practice may then deviate quite significantly from their publicly expressed 'ideals' (e.g. MUNCH RASMUSSEN 2014, pp. 85-86, 88-93). As we all should know, if only from observing our own behaviour, sincerely held beliefs in some high moral ideals need not, and rarely do, correspond to actual adherence to these ideals in practice by the individuals believing in those ideals (or, to use a biblical metaphor for this: "Let him who is without sin among you be the first to throw a stone..."; John 8:7).

¹⁶ Based on Austrian survey data (n = 133) on average numbers of days and hours per day searched by metal detectorists (Achleitner 2011, p. 2), and the handful of prosecutions for 'illegal' (though see the discussion of Austrian law above) metal detecting brought every year (not all of which are successful), I have estimated that the average Austrian metal detectorist has a chance of being prosecuted (not necessarily successfully) for an 'illegal' excavation (without a permit according to § 11 (1)

regimes are necessarily totally ineffective. The amount of investment into policing compliance which would be required to have even the remotest chance of changing that would, at the same time, be so vast that improving enforcement will never improve any deterrent effect penalties for non-compliance might have on rational actors.

Making matters even worse is the fact that many, if not most, 'looters' may well not behave as rational actors would, who calculate the probable gains of their ('illegal') actions against the probability of being punished and the likely costs of punishment, but display patterns of 'irrational' behaviour likened by some (e.g. Prokisch 2011, p. 149) to that of addicts. Also, Matthias Jung (2010) has demonstrated that at least some amateur archaeologists engage in fieldwork to cope with their psychological problems or social behavioural disabilities, and thus, at least where prohibitions against engaging in their self-therapeutic 'hobby' is concerned, are also unlikely to behave as rational actors.

Generally speaking, studies in the psychology of legal compliance have shown that people mostly do not obey the law out of fear of punishment, but rather voluntarily (e.g. Tyler 2006). They obey the law if "they believe that it is proper to do so", based on their evaluation of the "justice or injustice" of the particular law in question and the legitimacy of the authorities that have issued it, and of "the justice of their experiences" with the legal system, considering "factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect" (Tyler 2006). People thus will not normally comply with laws which they – from their subjective perspective – and the social group(s) to which they belong to consider to be unjust¹⁷ and/or counter-productive¹⁸, which they feel are enforced on them for the benefit of a legally and

DMSG) of slightly less than 0.0007%. This is – roughly – the same chance as winning the main prize of € 5 Million in the Austrian lottery (*Klassenlotterie*), which is 0.0004% (https://de.wikipedia.org/wiki/%C3%96sterreichische_Klassenlotterie, accessed: 19.10.2018). Statistically speaking, a metal detectorist would, on average, have to be active for c. 665 years to get caught once, or have a c. 1 in 13 chance to get caught once in 50 years of average activity. Considering such probabilities of being caught (and possibly, but not necessarily be punished), it can hardly surprise that any threats of punishment contained in the law are not worth the paper they have been printed on, and will never be.

¹⁷ And most people wishing to achieve certain aims – like actively engaging with archaeology in particular ways they like as their 'hobby' – consider laws that prohibit them from doing so as unjust.

¹⁸ And most people with an – however amateurish – interest in self-determined discovery of archaeology see the discrepancies between the stated aspirations of our heritage laws (or at least the state agencies over-interpreting their applicability and reach like the BDA does) to protect "all" archaeology from 'all' damage and their inefficiency to actually protect most archaeology from any damage, and thus at least suspect them to be utterly counter-productive. In fact, that obvious discrepancy between publicly stated aspiration and practical failure to even only remotely live up to is frequently not only seen as counter-productiveness, but interpreted as a result of the unjust privileging by law of the interests of a power majority – the professional and, especially, 'state' or 'public service' archaeologists – over theirs, as any cursory survey of relevant discussions on e.g. metal detecting Facebook groups or internet discussion fora demonstrates. Thus, the failure of professional heritage manage-

socially privileged power majority¹⁹, and which they perceive to be applied in a discriminatory manner to their disadvantage²⁰. Naturally, they will especially not comply with such unfair laws if these laws prevent them from lawfully achieving their aims, particularly if they feel their prohibited activities cause no serious harm, and doubly so if they feel that engaging in these activities incurs virtually no risk for themselves.

The 'discipline and punish'- approach taken by virtually all of our current heritage protection laws is extremely unlikely to achieve any compliance from those who want to discover archaeology, and thus will never be able to provide effective archaeological quality assurance. And the ultimate reason for this is that it effectively is the approach of the AHD (Smith 2006, pp. 29-34), the approach of the 'older' authoritarian-hierarchical model of social organisation mentioned at the beginning of this paper; which assigns all authority to a privileged few – us archaeologists – while treating everyone else as feudal subjects who have to listen to what we say and obey our commands, or (though in reality not) be punished.

To achieve compliance with practically unenforceable legal provisions aimed at achieving as effective an archaeological quality assurance as possible thus requires a different approach to be taken; especially in modern, liberal-egalitarian democracies we are living in: we need to convince citizens to voluntarily comply with what is required for archaeological quality assurance. And the only way to get those who want to discover archaeology – for whatever individual reasons – to comply with the requirements of archaeological quality assurance is to provide them with legal means to get what their heart wants.

ment to live up to its own publicly stated aspirations makes our laws to appear both counter-productive and unfair at the same time, de-legitimising them and us (as the perceived power majority responsible both for their content and their counter-productive implementation) doubly.

¹⁹ Again, where state heritage agencies, their officials, and professional archaeologists in general are concerned, see any metal detectorist Facebook group or online discussion forum for ample evidence of us being perceived in exactly this way (for a good example of such a debate, see JUNG 2010, pp. 258-292; for similar sentiments alluded to, regarding the Norwegian archaeological profession, see MUNCH RASMUSSEN 2014, p. 88).

²⁰ As is demonstrably the case in Austria, where the BDA charges metal detectorists caught *in flagrante* with violations of both § 11 (1) and § 8 (1) DMSG, even if there is no evidence that any law was actually broken (and indeed the charge self-contradictory, since the finds reporting duty of § 8 (1) DMSG applies to chance finds only, while the permit for § 11 (1) DMSG can only be required for intentional searches to discover archaeology, making it absolutely impossible that both provisions could have been violated by the same activity; see for a short discussion of one such case KARL 2016b, pp. 9-10). Despite being the same offences under the penal provisions of § 37 (2 and 3) DMSG, however, it has never charged archaeology graduates with any violations of the DMSG, even in cases where the BDA has positive knowledge that these 'professional' archaeologists have violated both the conditions of their § 11 (1) DMSG permits and the fieldwork results reporting duties of § 11 (6) DMSG (for a discussion of proven instances of this, see KARL 2018b, pp. 403-405). This clearly discriminatory application of the penal provisions of the DMSG by the BDA's archaeology officials, incidentally, directly violates the prohibition against privileges based on profession explicitly constitutionally outlawed by Art. 7 B-VG (BERKA 1999, p. 505); and thus is strictly illegal under Austrian law.

That means that we need laws which enable the state to achieve its legislative aims to protect heritage as effectively as possible and maximise the public benefits of its use (CoE 1992; 2005), but at the same time also enable compliant citizens to lawfully achieve their aims, while also containing effective means of disabling, as much as possible, non-compliance. Allowing 'responsible' citizens to lawfully achieve the aims that they desire is obviously a reward for compliant behaviour, and is in fact the only meaningful reward for compliant behaviour that can actually encourage compliance: it is the carrot. On the other hand, means to thwart most attempts by citizens to non-compliantly achieve their aims provide the only effective stick. If they can get, without doubt, what they want by complying with the law, but risk running into difficulties to get what they want when not complying with it, most people will voluntarily comply with the law.

4.2. A potential solution for Austria

In line with this reasoning, I have submitted a draft proposal for changing the archaeological provisions of the DMSG to the Austrian Minister of Culture in January 2018, which I hope will eventually form the basis for a further major revision of this law.

In this draft, I first of all propose a new definition of the term 'archaeological monument' (renamed in German to '*archäologisches Denkmal*') as any forgotten, lost, abandoned or hidden man-made objects (including remains and traces of intentional transformation and artificially constructed or modified soil formations)²¹, whose previous owner can no longer be determined. They must also have either fallen out of use sufficiently long to have become unusable (at least without disproportionate effort having to be invested to make them useable again) or be at least 100 years old when rediscovered. An exemption for modern rubbish which has recently been discarded with intent of disposal is also proposed. This new definition would have the advantage that virtually everyone will be able to determine with high confidence whether any find they make falls under the legal definition of the term 'archaeological monument'²², and thus allows to make all archaeological provisions of the proposed revised law applicable to all 'archaeological monuments', regardless of whether any particular one of

²¹ Effectively, any *res derelictae* in the classical meaning of the term.

²² Effectively, it means that any object would be an 'archaeological monument' if it is so old and damaged that anyone would assume that its reasonable owner would have discarded it as rubbish, and indeed did so a considerable time ago. To determine this, in contrast to the current definition of the term 'archaeological monument' in § 8 (1) DMSG 1999, no expert knowledge (or knowledge of the predominant appreciation of a particular object amongst experts) is required, and thus this determination can indeed be left to any citizen to be made correctly.

them has been scheduled by a separate administrative act or not²³.

Regarding fieldwork, I then propose that all non-invasive fieldwork is freely permitted, as it must be for constitutional reasons anyway, but that archaeological discoveries during any such survey work are subject to a general recording and reporting duty to the BDA. That same duty would also apply to all invasive work which might affect archaeology (i.e. on all sites where the presence of any archaeology is known or has to be reasonably suspected), including any invasive works for other reasons than to discover archaeology (e.g. development, deep-ploughing, uprooting of trees, etc.).

Naturally, on scheduled sites, all such invasive work would require a permit, as has been the case already since 1923.

On unscheduled sites (i.e. sites where at least a reasonable suspicion exists that any archaeology might be present on them), on the other hand, I propose that the revised law much more clearly specifies that all minor works are freely permitted²⁴, provided any archaeology discovered is appropriately recorded²⁵ (and reported to BDA). All major works, on the other hand, would require a state permit. This permit requirement would include archaeological excavations exceeding 1 cubic meter of dug out material; except archaeological excavations conducted by appropriately qualified, licensed, professional archaeologists²⁶, provided these are conducted in compliance with a general minimum recording standard for major invasive works²⁷.

²³ Since any reasonable citizen can, with a high degree of certainty, determine themselves correctly whether the law is applicable to any particular object, and even determine correctly *ex ante* to which kinds of objects the law is applicable before they have been found, the law can be made directly applicable. There is no need of first having heritage experts determine whether any particular object is sufficiently significant so that its preservation is in the public interest, and thus also no need for scheduling particularly significant 'archaeological monuments' by separate administrative act to tell ordinary citizens to which objects the law applies.

²⁴ As 'minor', any works are defined which penetrate the surface of the earth but only affect the topsoil or, if penetrating any deeper, affect less than 1 cubic meter of material in total. Thus, e.g. normal ploughing of fields, the planting of normal plants or crops (even if a small pit has to be dug for it), or putting in the foundations of a road sign would all fall under 'minor works'; while deep-ploughing, the uprooting of mature trees and any development works would not.

²⁵ 'Appropriately' means to an explicitly defined quality standard, which would have to be issued in the form of a legal ordinance by the Ministry of Culture (or the BDA, should the Ministry decide to delegate that power to it). It is suggested in my draft that the recording standard for 'minor works' is set relatively low – effectively to recording the location of the find with an ordinary GPS positioning device and taking a few photos of any finds, ideally *in situ* and after its extraction; i.e. records which can be created with any currently available smartphone – to enable anyone to comply with this standard with the greatest possible ease.

²⁶ I have proposed that professionally accredited archaeologists (e.g. by ClfA, RPA or other comparable accrediting bodies) and archaeology graduates could be granted such (revocable) licenses for 'freely' excavating any unscheduled site they like for periods of up to 10 years, naturally with a possibility of renewal provided the criteria for being issued such a license are still being met by the applicant.

²⁷ I have proposed that such a general recording standard for major invasive works is much stricter than that for 'minor works' and should be at least comparable to the already existing '*Guidelines for*

Up to this point, my proposal mainly serves to clarify what self-determined, participatory (non-invasive and invasive) archaeological fieldwork can be done, on which kind of (scheduled or unscheduled) land, by all Austrian citizens with or without a state permit, and by professionally qualified and accredited archaeologists with a general license. The main improvement proposed, in comparison to the current permit requirements under § 11 (1) DMSG – which, as shown above, technically only applies to fieldwork with intent to discover archaeology on scheduled archaeological sites – is to extend the excavation permit requirement to major invasive works for any purpose on land on which the existence of as yet unscheduled archaeology must reasonably be expected. Thus, where permit requirements are concerned, what I propose is actually stricter than what is currently the law in Austria²⁸.

4.2.1. Applied compliance psychology

Where my proposal considerably deviates from the current law (and, especially, administrative practice) is in its use of applied legal compliance psychology.

This is firstly in what activities it freely permits: it permits 'minor works' on unscheduled sites to everyone without the need to apply for and be granted a fieldwork permit. Thus, it allows the vast majority citizens who want to engage in participatory – that is, self-determined (Arnstein 1969) – (re-) search for the purpose of the discovery of archaeological finds to achieve their aim: to gain possession of portable archaeological finds located in (mainly) the topsoil (also see the new Dutch heritage law, which does effectively the same; Koninkrijk der Nederlanden 2016, Art. 2 (2.1)). Because this is demonstrably what the vast majority of archaeologically active citizens actually do, and actually want to do: hardly any ordinary citizen engaging in the extraction of portable archaeological objects wants to dig big, deep and thus labour-intensive holes. Moreover, this extraction demonstrably, at least in Austria, in virtually all cases causes at most minimal, and most often no, damage to 'undisturbed' stratified archaeological contexts and the finds preserved in them (Karl 2018b). Rather than focussing on ensuring that even small finds in the topsoil are preserved 'in situ' until they are discovered by professional archaeological excavations – which they never will be, because, at least in Austria, they are almost invariably removed with the un-

archaeological measures' of the BDA (2016; 2018) as currently attached to excavation permits as a firm permit condition.

²⁸ Though it is less strict than the – although, as demonstrated above, illegal – application of the current legal provisions of § 11 (1) DMSG 1999 by the BDA in its current administrative practice.

searched topsoil by mechanical digger in the context of professional (and BDA-permitted) archaeological excavations (Karl 2018b, pp. 396-397, 405) – archaeological quality assurance for such small-scale extraction activities must focus on their adequate recording and reporting.

Thus, to achieve maximal voluntary compliance with recording and reporting requirements for portable antiquities my proposal goes even further and also links the acquisition of lawful ownership in the finds made²⁹ with compliance with the recording and reporting duties contained in it. Provided the finder complies with these duties, he becomes the sole owner of any finds he makes while conducting freely permitted 'minor works'. During state-permitted 'major works', on the other hand, the finder becomes sole owner of any finds made if compliant with the (stricter) requirements for professional conduct and (higher) recording and reporting standards. Also included in my draft is a possibility for the state to compulsorily purchase at full market value particularly significant finds (of such significance that their preservation is in the public interest, i.e.: finds which should be scheduled), if their indefinite preservation would be jeopardised by remaining in private ownership. On the other hand, all archaeology extracted in non-compliant ways (from then onwards) would automatically become state-owned and can be confiscated if ever discovered³⁰.

²⁹ As already indicated above, Austrian law since the introduction of general (archaeological) finds reporting duties in §§ 397-401 ABGB in 1812 has always treated portable antiquities as *res derelictae*; as is evident from both the free acquisition of ownership in low-value finds by the finder according to § 397 ABGB (clearly based on *occupatio*); and the original (in § 399 ABGB 1812) equal division of ownership in (portable) finds between the finder (*occupatio*), the landowner (obviously based on *usucapio* by traditional use of the land they were part of until their discovery), and the state (based on *iura regalia* for *bona vacantia*) and the subsequent change to Hadrianic division between finder and landowner in 1846 (Karl *et al.* 2017) for finds of 'treasure'. Thus, it is within the legislative powers of the Austrian parliament to decide that for the purpose of protecting the archaeological heritage, the ownership rights in archaeological finds – whether they are of low value or 'treasure' – can be based on any of the principles of the creation of new title in *res derelictae*. In addition, there even is a traditional general preference in Austrian law for the free acquisition of property rights in all *res nullius* by *occupation* (§ 382 ABGB), making this option the obvious choice if it is beneficial for the preservation of (information about) portable archaeological objects in the context of their rediscovery.

³⁰ Given that under my proposal, all newly discovered archaeology must be adequately recorded and reported to the BDA, the BDA would necessarily build up a database of all newly legally extracted finds, which would have to be made publicly accessible. Thus, compliance and thus legal ownership of portable archaeology could easily be proven by checking this database. To avoid the problem of finds from 'old collections' not being included in the database, my proposal also contains a requirement for all current owners of collections of portable archaeology to record and report them (as if they were new finds) within a transition period (of, I suggest, 5 years). To achieve maximal voluntary compliance for this 'registration' of 'old collections' (and their content), this requirement is combined with a general amnesty for finds of unknown provenance in these already existing collections, with ownership in all such registered finds going to whoever reports them. While this means that finds possibly extracted illegally, or indeed stolen or otherwise illegally acquired, can be 'laundered', this is necessary for establishing an actually effective system of maximal encouragement to comply with the recording and reporting duties in the future. And since damage to archaeology which has already happened in the past due to illegal finds extraction cannot be undone anymore, creating an effective system to prevent future damage to archaeology seems more important to me than 'punishing' past offenders (who cannot be convicted in almost all cases anyway because of lack of the necessary proof of illegal acquisition).

To also achieve maximal voluntary compliance with the permit requirements for 'major works', a similar proposal is made in my draft for immoveable archaeology (features, ruins, etc.). Given that immoveable archaeology is necessarily part of the land it is situated on; it currently is property of the landowner when discovered. Under my proposal, this would also be the case, but only if the landowner is (and remains) compliant with his duties to not conduct any unpermitted 'major works', and complies with all professional conduct, recording and reporting duties if conducting permitted 'major works'. However, any archaeological site affected by non-compliant activities of the landowner becomes a state-owned servitude of the land (*Dienstbarkeit*, §§ 472-530 ABGB). This is comparable to Italian law, where immoveable archaeology discovered on privately owned land becomes state-owned property (Art. 91 in combination with Art. 10 *Decreto Legislativo 22 gennaio 2004, n. 42, "Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137"*), without the normal proprietary rights³¹ of the private landowner being affected. The only difference between that and my proposal is that under the latter, these *servitudes* would not automatically be created upon the discovery of archaeology, but only if the landowner fails to comply with his legal duties to treat it with the necessary care. And since servitudes reduce both the economic (resale) and use-value of their property, hardly any landowners will want them to come into existence, especially if, by complying with legal requirements they can reasonably easily fulfil, they can be entirely avoided, providing a strong motivation for them to voluntarily comply with them.

In addition, to provide further incentives for voluntary compliance with all of the legal requirements outlined above, my proposal also suggests that in case of non-compliance, the non-compliant party would also automatically forfeit any benefits gained via their non-compliant activities to the state. This automatic forfeiture would include the benefits of the sale of illegally acquired or profits gained by illegally destroying archaeology. Also, a possibility for the courts to impose punitive damages on non-compliant citizens (and legal persons), e.g. for failure to adequately record and report freely permitted discoveries or unprofessional conduct during state-permitted works, has also been included.

Thus, in very simple terms, my proposal maximally rewards heritage-beneficial, and maximally penalises heritage-damaging conduct. This is achieved, in effect, by permitting citizens to achieve their self-determined aims in any way they like, provided they comply with the necessary and

³¹ E.g. to continue to farm their land, or freely conduct those kinds of works my proposal defines as 'minor', without any state interference or needs for specific state permits.

proportionate regulations put in place to protect the archaeological heritage as a source of collective memory and for historical and scientific study by both present and future generations, while thwarting any attempts to achieve their aims non-compliantly.

5. Conclusions

As has been demonstrated in this contribution, archaeological heritage management (at least in Austria), has become ever more authoritarian-hierarchical and top-down in its attempts to achieve public compliance with the needs of archaeological quality assurance over the last 150 years. Over the same period, however, (Austrian) society in general has become ever more egalitarian-liberal, with an increasingly bottom-up approach to communal decision making having become the norm. No longer are the inhabitants of the state inferior subjects of divinely ordained political, social, and administrative state. Rather, as the responsible citizens of a modern, liberal democracy, they are all equal before the law, have fundamental constitutional civil and human rights, and as such are the sovereign whose will and interests the state and its administration has to serve and obey.

Hardly surprisingly, the legal system of states like Austria, who have adopted the latter model of social and political organisation, is at odds with a heritage management philosophy and administrative system effectively stuck in (and increasingly trying to enforce heritage protection by means characteristic for) the political and social organisation of the later 19th century. As such, the means the Austrian BDA has been using, and increasingly tried to strengthen and make ever more restrictive, of legal prohibitions and threats of (or actual execution of) punishment, not only have miserably failed in practice, but also are increasingly failing in the courts. If constitutionally guaranteed civil liberties and human rights enshrined in highest level international law come into conflict with ordinary laws and administrative acts disregarding them for the alleged benefit of the archaeological heritage, it is almost invariably the latter, rather than the former, which have to and ultimately do give.

Legal and administrative shenanigans, like the clearly unconstitutional and illegal interpretation preferred by the BDA and its discriminatory application of the provisions of § 11 (1) DMSG may help to stem the tide towards a more participatory archaeology for a while, but cannot do so forever. After all, there is a long, consistent trajectory of the development of the Austrian and international legal framework towards a more participatory, democratic approach, and no needs of archaeological quality assur-

ance, whether only alleged or actually real, can achieve what, sadly, so many of us really seem to want: that we, as a discipline, have complete and exclusive legal and actual control – that is, both legal ownership and possession – of what we consider to be the archaeological heritage.

Thus, to achieve what we always publicly proclaim to want – to protect the archaeology for all – we will have to come up with different means of archaeological quality assurance. I have proposed such means for Austria, but whether one fancies the proposals I have made or not, those means will have to enable, rather than prohibit, real, self-determined public participation in archaeological research (CoE 2005). Because if we protect the archaeology for all, rather than for its own (or even our own) sake and benefit, it is not the mere things – that which the archaeology is – that we have to protect, but rather the civil and human rights of everyone (Art. 27 (1) UDHR; Art. 15 (1 and 3) ICESCR; Art. (a), 4 (a and c) and 12 (a) CoE 2005; Art. 13 EU 2010; Art. 17 (1) StGG) – that what is done with archaeology – to actually use it, as they see fit, as a source of their collective memory and their historic and scientific study (CoE 1992).

The latter, we simply cannot do by protecting the archaeology “in the interest of all ... from the grasp of all” (Lüth 2006, p. 102), because in modern, democratic, liberal-egalitarian societies it is simply not our place, neither as professional archaeologists nor as state heritage managers, to decide, for what we believe to be the benefit of our subjects, what we believe to know is best for them, even if they do not want it. Rather, it is them who have the right to decide, for themselves, as unhindered by the state, its officials, and any ever so publicly-spirited others (like us professional archaeologists), what is good for themselves, and to do what they believe is right for themselves, as long as they do not seriously harm the public interest and the rights and freedoms of others.

Conducting participatory research in archaeology, for whatever reason, does not normally seriously harm either the public interest nor the rights and freedoms of others; quite to the contrary: it normally benefits them, as well as the interests, rights and freedoms of the one conducting it. Archaeological public authorities and heritage professionals like us have only two roles in the self-determined decisions of the individuals – the public – that we serve: to manage fairly and equally conflicting public and private interests in using the archaeological heritage; and to provide the systems, advice and guidance that helps those individuals who want to conduct their own participatory research in the best way they can. Because if we achieve this by doing our jobs properly and serving the public diligently and well (rather than abusing our expertise and/or office and the powers that come with both to serve ourselves), everybody wins: the archaeology, the public, and also us.

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